SOON LEE HUAT PALM OIL MILL SDN BHD A

v.

STABLE-WIN SDN BHD

COURT OF APPEAL, PUTRAJAYA B
HISHAMUDIN MOHD YUNUS JCA
SYED AHMAD HELMY JCA
MOHD ZAWAWI SALLEH J
[CIVIL APPEAL NO: J-02-371-2011]
29 MARCH 2013 C

CONTRACT: *Mistake - Mutual mistake - Whether mistake of law or mistake of fact - Whether mistake rendered agreement null and void - Contracts Act 1950, s. 22*

CONTRACT: *Termination - Lease agreement - Requirements under Malaysian Palm Oil Board Act 1998 and Malaysian Palm Oil Board (Licensing) Regulations 2005 - Whether complied with - Whether mutual mistake of fact by parties - Whether agreement null and void* D

The plaintiff entered into a lease agreement with the defendant granting the defendant the right to operate the mill owned by the plaintiff. Pursuant to the agreement, the defendant was required to apply and obtain a milling licence from the Malaysian Palm Oil Board ('MPOB'). Pursuant to the Malaysian Palm Oil Board Act 1998 ('MPOB Act') and the Malaysian Palm Oil Board (Licensing) Regulations 2005 ('the Regulations'), no licence could be issued concurrently to two different companies to operate the same mill. Therefore, it was agreed that MPOB would issue a new licence to the defendant upon the cancellation of the plaintiff's existing licence. However, the plaintiff subsequently issued a notice of termination of the lease agreement which resulted in the rejection of the defendant's application for the licence. The defendant thus commenced an action against the plaintiff in respect of the lease agreement and purchase of the shares in the plaintiff. The plaintiff, on the other hand, commenced an action against the defendant alleging that the defendant did not possess a milling licence to operate the mill and thus the lease agreement was null and void. The Judicial Commissioner allowed the plaintiff's originating summons and granted a declaration that the lease agreement was E F G H I

A null and void by reason of a mutual mistake of fact and ordered the defendant to surrender the mill to the plaintiff. Hence, this appeal by the defendant.

Held (allowing appeal with costs)

B **Per Mohd Zawawi Salleh J delivering the judgment of the court:**

(1) The learned Judicial Commissioner erred in holding that the parties were under a mutual mistake of fact as based on the evidence, the issue of mutual mistake did not arise at all. In
C the instant case, the lease agreement clearly provided that the defendant was required to apply and obtain the licence to on the operation of the mill. The parties had also mutually agreed that the plaintiff surrenders the existing licence to MPOB to enable the defendant's application for a fresh milling licence to
D be approved and that the defendant agreed to surrender the licence once the lease agreement expired. (paras 8, 9 & 11)

(2) Clause 3.17 of the lease agreement provides that the plaintiff was to grant the defendant the right to operate the mill. As
E the plaintiff's milling licence was not transferable or assignable to the defendant to operate the mill, it would thus be obligatory for the plaintiff to surrender its existing licence to MPOB and for MPOB to issue a fresh licence to the defendant. This would give effect to the lease agreement. In
F fact, the plaintiff had, by a letter dated 15 March 2010, agreed to surrender its existing licence to MPOB. Therefore, the plaintiff's objection to the granting of licence to the defendant contradicted cl. 3.17 of the lease agreement. (paras 19, 21 & 23)

G

(3) If the court was to accept the plaintiff's stand that both parties to the lease agreement entered into it under some misunderstanding and misapprehension as to the requirement of the mandatory compliance of the MPOB Act and the
H Regulations, that no licence could be issued simultaneously to two different companies to operate the same mill, then there was no doubt that the mistake was one of law and not of fact. The agreement was thus not voidable pursuant to s. 22 of the Contracts Act 1950. (paras 24-26)

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(4) In the circumstances, the defendant was entitled to its rights under the lease agreement and the possession of the mill. The lease agreement was also ordered to be extended for a further term of three years. (para 29)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif telah memasuki perjanjian pajakan dengan defendan, memberikan defendan hak untuk mengendalikan kilang yang dimiliki oleh plaintif. Berikutan perjanjian tersebut, defendan dikehendaki memohon dan mendapatkan lesen mengilang daripada Lembaga Minyak Sawit Malaysia ('LMSM'). Di bawah Akta Lembaga Minyak Sawit Malaysia 1998 ('Akta LMSM') dan Peraturan-Peraturan Lembaga Minyak Sawit Malaysia (Pelesenan) 2005, lesen tidak boleh dikeluarkan serentak kepada dua syarikat berasingan yang mengendalikan kilang yang sama. Oleh itu, dipersetujui bahawa LMSM akan mengeluarkan lesen baharu kepada defendan selepas pembatalan lesen semasa plaintif. Walau bagaimanapun, plaintif kemudian mengeluarkan notis pembatalan perjanjian pajakan tersebut yang mengakibatkan penolakan permohonan defendan untuk lesen. Defendan oleh itu, memulakan tindakan terhadap plaintif bagi perjanjian pajakan dan pembelian saham-saham plaintif. Plaintif pula sebaliknya, memulakan tindakan terhadap defendan dengan mendakwa bahawa defendan tidak memiliki lesen mengilang untuk mengendalikan kilang dan dengan itu perjanjian pajakan tersebut adalah batal dan tidak sah. Pesuruhjaya Kehakiman membenarkan saman pemula plaintif dan membenarkan deklarasi bahawa perjanjian pajakan tersebut adalah batal dan tidak sah atas kesilapan fakta bersama dan memerintahkan defendan mengembalikan kilang tersebut kepada plaintif. Maka, rayuan ini oleh defendan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mohd Zawawi Salleh H menyampaikan penghakiman mahkamah:

(1) Yang arif Pesuruhjaya Kehakiman telah terkhilaf dalam memutuskan bahawa pihak-pihak telah membuat kesilapan fakta bersama kerana berdasarkan kepada keterangan, isu kesilapan bersama tidak timbul sama sekali. Dalam kes ini, perjanjian pajakan tersebut jelas memperuntukkan bahawa

defendan perlu memohon dan memperolehi lesen untuk pengendalian kilang tersebut. Pihak-pihak juga telah sama-sama bersetuju agar plaintif menyerahkan lesen semasa kepada LMSM untuk membolehkan permohonan defendan bagi lesen pengilangan yang baru diluluskan dan defendan bersetuju untuk mengembalikan lesen tersebut sebaik sahaja perjanjian pajakan tersebut tamat.

(2) Klausa 3.17 perjanjian pajakan memperuntukkan bahawa plaintif sepatutnya memberikan defendan hak mengendalikan kilang tersebut. Oleh kerana lesen pengilangan plaintif tidak boleh dipindah milik atau diserahhak kepada defendan untuk mengendalikan kilang tersebut, adalah wajib bagi plaintif menyerahkan lesen semasanya kepada LMSM dan bagi LMSM mengeluarkan lesen baharu kepada defendan. Ini akan memberi kesan kepada perjanjian pajakan tersebut. Hakikatnya, plaintif telah, melalui surat bertarikh 15 Mac 2010, bersetuju untuk menyerahkan lesen semasanya kepada LMSM. Oleh itu, bantahan plaintif terhadap pemberian lesen kepada defendan bercanggah dengan kl. 3.17 perjanjian pajakan.

(3) Jika mahkamah menerima hujahan plaintif bahawa kedua-dua pihak kepada perjanjian pajakan memasukinya atas salah faham atau salah anggap terhadap keperluan pematuhan mandatori Akta LMSM dan Peraturan, bahawa lesen tidak boleh dikeluarkan serentak kepada dua syarikat yang berbeza untuk mengendalikan kilang yang sama, maka tidak diragui bahawa kesilapan tersebut adalah dari segi undang-undang dan bukan fakta. Oleh itu, perjanjian tersebut tidak terbatal di bawah s. 22 Akta Kontrak 1950.

(4) Dalam hal keadaan tersebut, defendan berhak ke atas haknya di bawah perjanjian pajakan tersebut dan milikan kilang tersebut. Perjanjian pajakan tersebut juga diperintahkan untuk dilanjutkan bagi tempoh tiga tahun lagi.

Case(s) referred to:
M Pakiam v. YP Devathanjam [1952] 1 LNS 60 ***(refd)***
Sheikh Brothers Ltd v. Ochsner [1957] AC 136 PC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 21, 22
Courts of Judicature Act 1964, s. 64(4)
Malaysian Palm Oil Board (Licensing) Regulations 2005, reg. 15

Other source(s) referred to:

Khoury and Yamouni, *Understanding Contract Law*, 6th edn, chats wood, Australia: Lexisnexis Butterworths, 2007, p 268

Prof Dato' Seri Visu Sinnadurai, *Law of Contract*; 3rd edn, pp 303 - 304

For the appellant - Joseph Iruthayam (Siti Khadijah Zainal Rashid & Sivanesan Ramasamy with him); M/s Joseph Iruthayam & Co

For the respondent - Parthiban MN Letchumanan (Noor Liana Hashim with him); M/s Kuan & Co

[Appeal From High Court Malaya, Muar; Originating Summons No: 24(L)-968-2010]

Reported by S Barathi

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner of the High Court of Malaya at Muar, Johor, delivered on 7 February 2011, granting the respondent/plaintiff's application for a declaration that a lease agreement dated 17 April 2009 entered into between the respondent/plaintiff and the appellant/defendant is null and void by reason of a mutual mistake of fact; and for an order that the appellant/defendant surrenders the palm oil mill to the respondent/plaintiff within seven days from the date of the order.

[2] We have unanimously allowed the appeal with costs fixed at RM15,000.

[3] We now give our reasons.

[4] For ease of reference, we will be referring to the parties as they were at trial below, that is to say, as plaintiff and defendant, as the case may be.

The Facts

[5] The facts of the case can be summarised as follows:

(a) Ecofuture Bhd (EB), a public listed company, owns 100% shares in the plaintiff company, Stable-Win Sdn Bhd. One Yeo Kim Luang is a common director and shareholder of both EB and the plaintiff.

(b) EB owned a palm oil mill (the mill) at Labis Road, Segamat, Johor, and a milling licence to operate the mill. Both EB and the plaintiff were not in a financial position to operate the mill for two years prior to April, 2009; and the mill was operating undercapacity and was in a dilapidated state.

(c) Yeo Kim Luang invited the defendant to take on a lease of the mill and to operate the same. Subsequently, a lease agreement dated 17 April 2009 was entered into between the plaintiff and the defendant.

(d) The defendant incurred a sum of RM3,134,497.94 for repair and upgrading works to the mill.

(e) The Malaysian Palm Oil Board (MPOB), by a letter dated 17 July 2009 to the defendant, granted a temporary milling licence to the defendant.

(f) The plaintiff, by a letter dated 13 August 2009, objected to the issuance of the temporary licence to the defendant.

(g) In view of the objection by the plaintiff, the MPOB, *vide* a letter dated 28 August 2009, requested the parties to discuss and settle the matter amicably, before a fresh licence is issued to the defendant.

(h) The defendant, by a letter dated 23 December 2009 to the plaintiff, confirmed that, pursuant to a meeting held between the defendant, the MPOB and the plaintiff on 21 December 2009, it had given an assurance that upon the issuance of a fresh licence to the defendant, it will surrender the licence to the plaintiff once the lease agreement expires.

(i) The MPOB, by its letter dated 4 April 2009 to the plaintiff, notified that a fresh milling licence can only be issued to the defendant upon the cancellation of the existing milling licence issued to the plaintiff; and confirmed that Yeo Kim Luang will be appointing solicitors to review the lease agreement. The MPOB also informed the plaintiff that, in view of the lease agreement that was in force, the existing licence that is now issued to the plaintiff cannot be maintained.

(j) The plaintiff, by its letter dated 15 March 2010 to the MPOB, agreed to surrender its existing milling licence.

(k) On 27 July 2010, EB and the defendant entered into an agreement for the purchase of shares in the plaintiff company, wherein the defendant agreed to purchase the 100% shares of the plaintiff company together with the mill.

(l) The MPOB, by a letter dated 4 August 2009 to the plaintiff, notified the latter that the Malaysian Palm Oil Board (Licensing) Regulations 2005 ("the MPOB Regulations 2005") provides that no licence can be issued to two companies for the same premises. Therefore, a fresh milling licence to the defendant can only be issued upon the cancellation of the plaintiff's existing licence.

(m) The plaintiff's solicitors, Messrs KC Yap & Partners, by their letter dated 14 December 2010, issued a notice of termination of the lease agreement.

(n) The MPOB, by their letter of 15 December 2010, rejected the defendant's application for a fresh licence. However, in para. 5 of the MPOB's letter, it indicated that a show cause would be issued to the plaintiff as to why the licence issued to the plaintiff should not be cancelled, suspended or renewed under reg. 15 of the MPOB Regulations 2005.

(o) The defendant, on 20 December 2010, *via* Shah Alam Originating Summons No: S-24-2914-2010 commenced an action against both EB and the plaintiff in respect of the lease agreement and the purchase of shares in the plaintiff. However, subsequently, it withdrew the originating summons action. Instead, the defendant then filed a writ action against EB, the plaintiff and Yeo Kim Luang at the KL High Court Commercial Division (and the trial is scheduled to be heard in March 2013).

(p) The plaintiff, on 21 December 2010, *via* Muar High Court Originating Summons No: 24(L)-968-2010, commenced an action against the defendant alleging that the defendant did not possess a milling licence to operate the said mill and thus the lease agreement was null and void.

(q) On 7 February 2011, the learned Judicial Commissioner of the High Court at Muar, allowed the plaintiff's Originating Summons action, and granted a declaration that the lease

agreement was null and void; and ordered the defendant to surrender the mill to the plaintiff; and for the plaintiff to repay to the defendant all benefits conferred by the defendant to the plaintiff.

(r) Both the Muar High Court and the Court of Appeal dismissed the defendant's application for stay of execution of the order of the Muar High Court. The mill has since been surrendered to the plaintiff on 7 March 2011.

Decision Of The High Court

[6] The learned Judicial Commissioner declared that the lease agreement was null and void on the grounds of a mutual mistake. In her ruling, the learned Judicial Commissioner said:

> 10. I therefore find that there was a mutual mistake of fact in that both parties were under the misapprehension that the Plaintiff could retain its licence whilst the Defendant is required to apply and obtain a licence from the MPOB in order to operate the Mill under clause 3.17 of the Lease Agreement, whereas in fact the parties were unaware that under the MPOB Act 1998 and the MPOB (Licensing) Regulations 2005 (P.U.(A)516/2005)("the Regulations") the MPOB is not able to issue more than one licence in respect of a particular mill. In view of section 21 of the Contracts Act, I find that the Lease Agreement is void as the issue of the licence under the Lease Agreement is an essential term of the Lease Agreement, without which the Defendant cannot operate the Mill.

Issue For Determination

[7] The main and important issue for determination by this court is whether the learned Judicial Commissioner erred in law and fact when she held that there was a mutual mistake of fact in that both the parties were under the mistaken belief that the plaintiff could still retain the licence issued by the MPOB, notwithstanding cl. 3.17 of the lease agreement; and that the parties were unaware that under the Malaysian Palm Oil Board Act 1998 (Act 582) and the Malaysian Palm Oil Board (Licensing) Regulations 2005 (PU(A)516/2005) no licence could be issued concurrently to two different companies to operate the same mill; and because of this mutual mistake, the lease agreement is null and void by reason of s. 21 of the Contracts Act 1950.

Decision Of This Court

[8] With respect, we are of the opinion that the learned Judicial Commissioner fell into error when she held that the parties were under a mutual mistake of fact in thinking that the plaintiff could still retain its existing licence, whilst the defendant applies for a licence from the MPOB to operate the same mill.

[9] In our judgment, based on the evidence before the court, the issue of mutual mistake does not arise at all. In the instant case, the lease agreement clearly provides that the defendant is required to apply and obtain the licence to carry on the operation of the mill. Clause 3.17 of the lease agreement reads as follows:

> 3.17 MPOB Licence
>
> The Lessor shall grant to the Lessee the rights of operating the palm oil mill including all mining, buying and selling of fresh fruit bunches, palm kernel, crude palm oil and etc after signing the Lease Agreement. The Lessee shall apply for and obtain the MPOB licence in order to carry out trading activities in palm oil and oil palm business as soon as practicable.

[10] In our view, implicit in the above clause is the requirement for the plaintiff to surrender its existing licence to the MPOB; as only one milling licence will be issued in respect of a mill. Since the plaintiff has leased the mill to the defendant and ceased milling activity, the plaintiff's existing licence must be surrendered in order for a fresh licence to be issued to the defendant.

[11] There is evidence on record to show that the parties had mutually agreed that the plaintiff surrenders the existing licence to the MPOB to enable the defendant's application for a fresh milling licence to be approved; and the defendant's agreement to surrender the licence once the lease agreement expires. The terms were contained in a letter dated 15 March 2010, written after mutual agreement between the parties. A perusal of the letter will confirm that the parties had, at a meeting with the MPOB on 21 December 2009, reached an amicable agreement; and pursuant thereto the defendant had given an assurance to surrender the licence once the lease expired.

[12] The terms of the letter of 15 March 2010 were arrived at after the MPOB's letter of 4 August 2009. In their letter of 4th August, the MPOB notified the defendant that no two

licences would be issued to two companies for the same premises. And the licence to the defendant could only be issued after the cancellation of the plaintiff's existing licence. The letter also notified the plaintiff that with the lease agreement being in force, the existing licence held by the plaintiff could not be maintained. This was confirmed by the plaintiff's solicitor's notice of termination dated 14 October 2010.

[13] In the light of the above scenario of the state of affairs between the parties, we are of the opinion that the learned Judicial Commissioner erred in her finding that there was a mutual mistake of fact as between the parties pertaining to the milling licence.

[14] As far as a mistake of fact is concerned, the Malaysian Courts, in the absence of any clear authority on this point, will tend to follow the common law principles (See *Sheikh Brothers Ltd v. Ochsner* [1957] AC 136 (PC), *M Pakiam v. YP Devathanjam* [1952] 1 LNS 60; [1952] MLJ 58 (CA).

[15] At common law, in order to have the courts declare a contract void because of common mistake, more is required than just establishing the making of any sort of common mistake. Khoury and Yamouni, in a book entitled "*Understanding Contract Law*" (6th edn, chats wood, Australia: Lexisnexis Butterworths, 2007), when discussing of common mistake at common law, summarised the position in the following terms at p. 268:

> The courts will not render a contract void on the ground of common mistake unless the common mistake involves a matter which is so fundamental to the contract that both parties regard it as a condition precedent to the existence of binding contract. Whether a common mistake is of that nature will, of course, depend upon the facts of the case. However, decided cases, suggest that to be fundamental, the common mistake must either:
>
> - Relate to the very existence of the subject matter of the contract, or
>
> - Involve the sale of property to a person who already owns it.
>
> By way of contrast, a common mistake as to the quality, nature or value of the subject matter is not sufficient.

[16] The English common law principle of mutual mistake is codified in s. 21 of the Contract Act 1950. Section 21 provides for a mistake made by both parties to an agreement. It reads:

> 21. Agreement void where both parties are under mistake as to matter of fact.
>
> Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

[17] Prof Dato' Seri Visu Sinnadurai, in his book entitled *"Law of Contract;* 3rd edn.", had this say on the scope of s. 21 of the Contracts Act 1950 at pp. 303 - 304:

> For a mistake to be operative under section 21, it must be one "essential to the agreement". The circumstances under which a fact may be regarded as "essential to an agreement" are not made clear by the Act. All the three illustrations to the said section only envisage situations of *res* extinct (non-existence of the subject matter of the contract), or *res sua*. However, it is clear that section 21 is not restricted to such mistakes alone: see the Privy Council case of *Sheikh Brothers Ltd v. Ochsneer*, and the judgment of Gill J in *Tham Kong v. Oh Hiam*. See also *M Pakiam v. YP Devathanjam*.

[18] On the facts of the instant case, we are of the opinion that there is no mutual mistake occurring between the parties to the lease agreement.

[19] On a plain reading of cl. 3.17 of the leased agreement, it is clear that the lessor (the plaintiff) was to grant the lessee (the defendant) the right to operate the mill. As the plaintiff's milling licence is not transferable or assignable to the defendant to operate the mill, it would thus be obligatory for the plaintiff to surrender its existing licence to the MPOB, and for the MPOB to issue a fresh milling licence to the defendant. This would give effect to the leased agreement.

[20] Further, cl. 3.4 of the leased agreement requires the defendant to comply with the legislation and regulations governing the palm oil mill; and the defendant had duly complied with the same.

[21] It is not in dispute that by a letter dated 13 August 2009, the plaintiff had objected to the defendant's application for the licence. In its letter, the plaintiff protested, "At no time have we allowed you to apply to MPOB for any licence to operate our palm oil mill. We strongly object to your MPOB application". It is obvious that the position taken by the plaintiff contradicts cl. 3.17 of the lease agreement since as a matter of law the defendant would require a licence issued by the MPOB in order to operate the mill.

[22] In the circumstances of the case, what the defendant did was what was required to be done under cl. 3.17 as lessee and under the MPOB Regulations 2005.

[23] There is also evidence that the plaintiff, by its letter of 15 March 2010, had agreed to surrender its existing licence to the MPOB to enable MPOB to issue a fresh licence to the defendant to operate the mill.

[24] This is not, however, the end of the matter. Learned counsel for the defendant further submitted that, in the circumstances of the instant case, even if there had been a mutual mistake, the mistake is only one of law and not one of fact. And where the mutual mistake is only as to the law then, by virtue of s. 22 of the Contracts Act, 1950, it is not voidable.

[25] In our judgment, there is merit in this submission. If we were to accept the contention of learned counsel for the plaintiff that both parties to the lease agreement entered into it under some misunderstanding or misapprehension as to the requirement of the mandatory compliance of the MPOB Act and the MPOB Regulations 2005, that no licence can be issued simultaneously to two different companies to operate the same mill, then there is no doubt that the mistake is one of law and not one of fact.

[26] Now, s. 22 of the Contracts Act 1950 provides as follows:

> 22. Effect of mistake as to law.
>
> A contract is not voidable because it was caused by a mistake as to any law in force in Malaysia; but a mistake as to a law not in force in Malaysia has the same effect as a mistake of fact.

ILLUSTRATION

A and B make a contract grounded on the erroneous belief that a particular debt is barred by limitation: the contract is not voidable.

[27] The difference between a mistake of fact and a mistake of law is very clear. To put it simply, mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. Whereas, a mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment, upon facts, and necessarily presupposes that the person forming it is in full possession of the facts. (See *Black's Law Dictionary Free Online*, 2nd edn).

Consequential Order Of This Court

[28] Now, what had happened in the present case is that, consequent to the order of the learned Judicial Commissioner, the defendant had surrendered the mill to the plaintiff *vide* a writ of possession dated 2 March 2011, which was executed on 7 March 2011.

[29] As we have allowed the defendant's appeal, the defendant is therefore entitled to its rights under the lease agreement and the possession of the mill. In the circumstances of the case and pursuant to an oral application by learned counsel for the defendant, in the exercise of our powers under s. 64(4) of the Courts of Judicature Act 1964, we made an order that the lease agreement be extended for a further term of three years effective from 15 May 2012 and expiring on 14 May 2015.